IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 561-562

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOSEPH L. WEINER,
52 Wall Street,
New York 5, N. Y.,
Attorney for Petitioner Harold Gottfried.

HENRY EPSTEIN,
30 Broad Street,
New York 4, N. Y.,
Attorney for Petitioner Joseph Forman.

FRANCIS MARTOCCI,
227 Fair Street,
Kingston, N. Y.,
Attorney for Petitioner William Stanton.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners Harold Gottfried, Joseph Forman and William Stanton respectfully pray for a reconsideration of their petition for a writ of certiorari, denied by your Honorable Court on March 29, 1948.

For a statement of the matters involved, the opinion of the Circuit Court, etc., reference is made to the petition for certiorari and the answering brief of the Government.

Petitioners are conscious of the unusual nature of their request, but, since their liberty is at stake, ask the Court's indulgence to consider the matters below, not heretofore argued or discussed only summarily.

I

The Method of Jury Selection

On the same day on which this Court denied the petition herein, it decided *Moore* v. *New York*. In the latter, it reaffirmed the unconstitutionality of class exclusions in the selection of juries, but rejected an attack on the New York special jury statutes on the ground that they had been sustained, "against a better supported challenge," in *Fay* v. *New York*, 332 U. S. 261. Four dissenting Justices concluded that such panels are "at war with the democratic theory of our jury system," and should be condemned without requiring proof that they are more prone to convict.

In view of the more pervasive jurisdiction of this Court over the Federal Courts (*Fay* v. *New York, supra*), we respectfully urge the Court to reconsider the method of selection of juries practiced in the Southern District of New York, as disclosed by the record herein.

1. It is not denied that such selection is carried on by the clerk of the court, wholly without supervision or direction by the judges of the court.

2. It is not denied that the residents of eight of the eleven counties of the district are not called for jury services unless they volunteer. In the *Report to the Judicial Conference of the Committeee on Selection of Jurors* (Sept., 1942), the Committee spoke out against any clerk using "volunteers." Recommendation II(5) states:

> "Unsolicited requests of persons who seek to have their names placed upon jury lists * * * should not be recognized."

In our original petition we endeavored to show that in view of the character of the excluded counties as contrasted with the included ones, the system of jury selection resulted in class distinction of the character heretofore condemned.

But apart from that question we urge that such a system is potentially a greater menace to a fair trial than the conjectural consequences of the systematic exclusion of, say, women.

The record here sounds a warning note. A former Assistant United States Attorney, who happened to be in the court room, recognized the foreman of the jury as having sat on a case which he had tried for the Government in 1936 or 1937 and asked, "Is that Juror No. 1, your foreman, a Dutchman with the first name Van something-or-other from the phone company?" (5195).* Inquiry of another Government counsel in that case revealed that he recalled this juror and said, "Yes, he was the guy who would not listen to the defense counsel; he turned his back" (5343-4). Further investigation disclosed that this juror served in 1933, 1935, 1938, 1942 and 1944 (5702-8), in addition to his service here early in 1947. The three counties from which jurors are actually called are among the most populous counties in the United States. It may be that the systematic *calling* of this juror was entirely regular. But in view of the clerk's exclusion of jurors from the up-State counties, and his inclusion of volunteers, both without court order, the suspicion will not down that other irregularities may exist. The jury system should be above suspicion. The United States Attorney's office has boasted of its record of convictions (*New York Times*, Feb. 3, 1947, p. 14, col. 2, "Reports 99.1% Convictions"). Were they obtained from juries properly selected?

Only a defendant with an extremely long purse could afford to make a comprehensive investigation of the actual composition of the jury list. We do not suggest that either this Court or the lower courts should undertake to do so. We do believe that visible and open violations of the requirements for jury selection should be condemned rather than condoned. To that extent, at least, it should be borne

* References are to folios. When italics are used they are supplied.

home to the clerks that there are requirements of law to which they must adhere scrupulously.

The clerk's suggestion that the reason for the exclusion of potential jurors from other counties is to save the Government mileage fees hardly needs comment. As Mr. Justice Jackson said in another connection, "it savors more of the publican than of the guardian." (*Connecticut Mutual* v. *Moore,* March 29, 1948.)

The clerk's further suggestion that these residents are spared discomfort and expense is no more impressive. If the jury list were as broad as it should be, no individual need be called frequently. Such service is a small and necessary price for citizenship in a democracy. Petitioner Gottfried volunteered for service during the war and thereby enabled his employees to steal from him (Pet., p. 4), as well as accuse him.

Petitioners have been deprived of the essential requirements of trial by a jury of their vicinage. This right was so prized by the people of the Revolution that they added the Sixth Amendment to the safeguards already provided in the Constitution. Congress has jealously attempted to preserve this right even in cases where the Constitution may not require it. But, further, petitioners have been subjected to trial by a jury specially selected in a manner neither authorized nor contemplated by Congress. Whatever may be the status under the Fourteenth Amendment of special juries [1] authorized by state legislatures, such juries have no place in the Federal system. When they creep into the practice of the clerks in metropolitan districts, through the diffusion of authority among the judges, it is for this Court to point out the error and correct the evil.

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[1] Severe criticism of special juries can be found in Bentham, e.g., "Principles of Judicial Procedure", ch. 24 (2 Works, Bowring ed. [1843]).

II

The Statute of Limitations

Our discussion of the statute of limitations issue failed to point out the public importance of having it authoritatively settled. We therefore respectfully ask the Court to consider the following.

The Suspension Act is applicable to the millions of statements filed by individuals and corporations with the various government departments in the course of the war, in connection with rationing, allocations, price control, and the like. The investigation of these statements must necessarily present a monumental task. If, as was held in the *Marzani* case, the three-year statute is applicable, then it follows that statements made prior to that time should not be investigated, and that those near that time should be investigated promptly, if at all.

It seems probable that the volume of cases affected by the decision will be substantial. We know of three indictments in the Southern District of New York which have not been tried because of the pendency of this petition. There are other decisions, e.g., *U. S.* v. *Agnew*, 6 F. R. D. 566 (D. C. E. D. Pa.); *U. S.* v. *Raphael*, ... Fed Supp. ..... (D. C. E. D. N. Y. ....., Mar., 1947).

It is also reasonable to infer that many cases will be brought in the District of Columbia, in view of the volume of such statements made to officials in Washington or filed with them. It is hardly conceivable that the judges of the court of that district would ignore the *Marzani* opinion, even if the Government were correct in its contention that it is only a dictum. The fact is that the *Marzani* opinion is elaborately considered, based upon legislative history and decisions of this Court (which unfortunately were not brought to the attention of the Court of Appeals for the Second Circuit), persuasive in reasoning, and authoritative in manner.

We are advised that counsel for *Marzani* have filed a petition for re-hearing which is still pending. Surely, that Court considers its disposition of the earlier counts as a decision. Construction of the statute by this Court would expedite decision and assure even-handed justice.

We do not undertake here to answer the Government's criticism of the merits of the *Marzani* opinion. Even a cursory reading of the opinion shows that the Government's argument was carefully considered. Since the grounds on which *Marzani* is based were not brought to the attention of the Court of Appeals for the Second Circuit it seems likely that in other circuits more weight will be attached to *Marzani*. Only this Court can provide an authoritative answer, and certiorari should therefore be granted.

III

The Stanton "Confession"

We fear that our summary discussion of the circumstances surrounding the alleged confession may have failed to convey the true impact of these circumstances. We therefore respectfully ask that the fuller statement which follows be considered.

Stanton had been questioned about an alleged bribe in connection with his Pure Rock investigation as far back as September and December, 1944 (2738-43, 3063-8, 3072-3). On these occasions he had consistently denied any wrongdoing (3069, 3073). He was then already represented by the attorney who tried the instant case on his behalf (2737-8).

In 1945 Stanton was a prisoner in the Federal Penitentiary at Danbury, Connecticut (2271). On June 1 of that year, a writ of habeas corpus ad testificandum to the warden of that institution issued out of the District Court for the Southern District of New York which directed Stanton's production on June 8 for testimony before a grand

jury and his return to Danbury "*immediately*" thereafter (Def. Ex. XX).

On June 6 Stanton was transferred to the Federal Detention House in West Street, New York City (3113).[2] Two days later, on June 8, he was taken to the office at the Federal Courthouse of an Assistant United States Attorney, Bender. As the stenographic record of this interview (Gvt. Ex. 51) reveals, Stanton was repeatedly advised that he was allowed to refuse answers *only* on constitutional grounds (7040, 7043, 7064), and that failure to answer nonincriminating questions would expose him to "punishment for obstruction of justice" (7039). At the very outset, Stanton requested permission to consult his attorney of record before answering questions, but was told that he had no right to do so (7040). As a result of these admonitions he consented to answer a line of general questions; but he again requested counsel and refused to answer when the Pure Rock matter was brought up (7062-7); and it was only after he had been subjected to further pressure that he finally placed his refusal "on the ground that it might incriminate without counsel, without legal advice" (7068).

Produced before the grand jury later the same day, Stanton once more refused to testify on the Ellenville matter without the advice of his attorney (Gvt. Ex. 52). At the request of an Assistant United States Attorney he was then instructed by the foreman that he was not allowed to reveal his appearance before the grand jury to anybody, and that he was under a duty to conceal it even from his counsel (7093-5).

Stanton was not again taken before the grand jury (6020) which continued to be in session (6038-9), or "immediately" returned to Danbury as directed by the terms of the writ, but was held for two more weeks at the West Street De-

[2] On that day Stanton received a visit of his attorney at the detention house; but neither he nor his counsel knew on what process and for what purpose he had been transferred (2744-7, 3118, 2272-82). Efforts to find out about these matters made by Stanton's attorney the same day remained unsuccessful (2748-51).

tention House. True, the return endorsed on the writ, upon which apparently a judge was later asked to discharge the process, purports to set forth that Stanton was "produced in court" on June 11, 14, 15, 16, 18 and 20 (Def. Ex. XX). *But it is uncontroverted that the return is false.* Stanton was actually subjected to further questioning only in Bender's office, and that took place apparently on four of these dates (2258-9, 3000, 3006) and also on June 13 (6176, 6187-8, 6264), Stanton having in each instance been brought from West Street to the office of the United States Attorney at Bender's request (3127-8, 5969-72).

On June 14, while one of these interrogations was going on, Stanton's counsel called at Bender's office, but was denied access and refused any appointment with Bender prior to June 19 (2751-6).

Contrary to standing instructions (3130-5), the deputy marshals charged with Stanton's custody were not allowed to enter Bender's room with their prisoner (3099, 3103, 3229, 6178, 6257). Nor were any stenographers or other neutral persons present during any of the interrogations between June 8 and June 16. Only the statements of interested witnesses, Bender and two federal investigators on the one hand, and Stanton and his wife on the other, throw any light on what happened on these occasions, and their testimony, as was to be expected, is in hopeless conflict.

Stanton asserts that he was threatened with indefinite detention in West Street (2343-4),[3] contempt of court proceedings (2314-22),[4] a transfer from Danbury to a less comfortable institution (2328-30) and the blocking of his parole (2331-2); and that it was only because of his desire to be returned to Danbury that he gave in and on June 16

[3] This is confirmed by Mrs. Stanton (2179-80).

[4] Remarks about a consultation with the court in advance of an intended second appearance of Stanton before the grand jury, which were exchanged in Stanton's presence in the grand jury room on June 8 between the foreman and an Assistant United States Attorney (7093), may well have caused such fears.

finally consented to make whatever statement Bender wanted to extract from him (2343-4). Mrs. Stanton, who on June 14 had been taken in Kingston by two investigators acting at Bender's direction and brought by automobile to New York City, testified that she advised her husband to make a false confession in order to secure his release from West Street (2172).

Bender and the investigators, of course, emphatically denied that any threats were made. According to them, Stanton offered as early as June 11 to make a statement in the event that he should obtain certain information from his wife (2786-7), and told them on June 14 that he was definitely willing to confess, allegedly because Mrs. Stanton had indicated that Forman had not provided for her (2981-2).

But this version fails to account in any way for the sudden decisive shift in Stanton's position between June 8 when the transcript records him as having categorically refused to answer any question, and June 11 when he allegedly offered to confess after consultation with Mrs. Stanton.

Moreover, also according to these witnesses of the prosecution, Stanton asked, after an interview with his wife in West Street on June 14, to be taken to Bender's office for questioning (2791, 6196), but upon his arrival there at once requested and was granted one or two days to prepare himself (2819, 6142-3). That leaves entirely obscure why Stanton was held in Bender's office for several hours thereafter (2816-9), why it became necessary on two occasions to send Mrs. Stanton out of the room for extended periods of time (6142, 2823), and why Bender refused that very afternoon to see Stanton's counsel (2751-5). It remains equally mysterious why it became necessary to bring Stanton to Bender's office the day before and the day after this interview and what occurred at these times.

In an effort to picture the statement taken on June 16 as the first complete account of the facts given to them by Stanton and as wholly spontaneous, Bender and the two

investigators claim that there was no discussion in the absence of the stenographers and no colloquy off the record on that day (2980, 3104, 6031). But their testimony as to the time occupied by the questioning on June 16 is in bad conflict (6209-11, 6274-82, 3247-8, 3252, 6035), and the transcript shows on its face that it was carefully rehearsed.[5] Moreover, one of the investigators admitted that "various parts of the government's case"—which could hardly have consisted of anything but statements by Long—had previously been imparted to Stanton (2786).

In any event, the uncontroverted facts alone have an unsavory flavor of star chamber proceedings.

The writ ad testificandum did not authorize any questioning of Stanton outside of the grand jury room and still less his being shuttled back and forth between West Street and the office of the United States Attorney for secret interrogations. Indeed, we believe that such measures could not be authorized even by a judge. This abuse of process is particularly reprehensible because committed by an officer who had a special responsibility for the proper execution of judicial mandates. *United States* v. *Scroggins,* Fed. Cas. No. 16,244 (C. C. N. D. Ga., 1879).

Moreover, the situation was inherently coercive. Bender in fact had usurped control of Stanton's movements from and to the courthouse and of the length of his detention in West Street. The mere existence of this power, whether referred to in words or not, carried the threat that the return to Danbury might be indefinitely postponed.

The irregular absence of the deputy marshals during the interviews, the steps taken to obtain the statement without

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[5] According to the statement Stanton was requested by the Albany O.P.A. office in connection with his application for employment to fill out a form which he had already filed some months earlier with the Civil Service Commission (3362). The next question anticipates the rather surprising and unusual reaction that he resented this request and allegedly even went so far as to complain to Forman about it (3363). Another example is Stanton's explanation about the denomination of the bills allegedly given to him by Forman, which was not called for by any question reflected in the transcript (3420).

the knowledge of Stanton's counsel, and most of all the failure to produce Stanton before the grand jury after his confession complete the picture of a secret inquisition.

Finally, Stanton was under no legal duty to make any statement to Bender, did not become liable to punishment for his refusal to do so, had a perfect right to consult counsel before volunteering any answer and to freely discuss his appearance before the grand jury with his attorney; and *he was misadvised by the United States Attorney as to his legal rights on all these points.*

> *"The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.* Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. *It is this kind of service for which the Sixth Amendment makes provision."* (*Von Moltke* v. *Gillies,* L. Ed. Advance Opinions, Vol. 92, p. 286 at p. 297, decided January 19, 1948.)

If a free man were forcibly brought before a prosecuting officer on five or six consecutive occasions, misled as to an alleged testimonial duty, threatened with punishment for failure to answer, and during all this time prevented from consulting with counsel and held under conditions which only yielding could bring to an immediate end, the conclusion would be inescapable that a confession thus extracted could not be used. Indeed, such a procedure would obviously fall within the condemnation of *McNabb* v. *United States,* 318 U. S. 332 (1943), and would squarely violate Criminal Procedure Rule 5 which requires an accused to be advised "that he is not required to make a statement," and "of his right to retain counsel," and to be allowed "reasonable time and opportunity to consult counsel." It is true that Rule 5 in terms only contemplates the situation of a person just placed under arrest. But Stanton's pre-existing status as a prisoner did not justify any lesser safeguards in connection with a new charge. On the contrary, his helplessness called for increased fairness and

zeal in the protection of his legal rights. *United States* v. *Bayer,* 156 F. (2d) 964 (C. C. A. 2d, 1946), rev'd on other grounds 331 U. S. 532.

The disregard of civil rights and fair procedure practiced by the Government for the purpose of securing this "confession" is greater than that condemned in *In re William Oliver,* Oct. Term 1947, decided March 8, 1948.

A conviction thus obtained should not be allowed to stand in any case where the stake is personal liberty.

Respectfully submitted,

JOSEPH L. WEINER,
Attorney for Petitioner Gottfried.

HENRY EPSTEIN,
Attorney for Petitioner Forman.

FRANCIS MARTOCCI,
Attorney for Petitioner Stanton.

April 7, 1948.

IT IS HEREBY CERTIFIED that the within petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds set forth in Rule 33 of the Rules of the Supreme Court of the United States, as amended.

JOSEPH L. WEINER,
Attorney for Petitioner Gottfried.

HENRY EPSTEIN,
Attorney for Petitioner Forman.

FRANCIS MARTOCCI,
Attorney for Petitioner Stanton.

April 7, 1948.